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### Freedom, Benefit and Understanding: Reflections on Laurence Claus's Critique of Authority

John Finnis

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# Freedom, Benefit and Understanding: Reflections on Laurence Claus's Critique of Authority

JOHN FINNIS\*

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With wide-ranging and illuminating determination, *Law's Evolution and Human Understanding*<sup>1</sup> offers a refutation of the illusion of authority. No one, it rightly contends, has the right to be obeyed. Still less, as it correctly says, do any persons have the right that their say so be obeyed because they said so.<sup>2</sup> Given the book's stipulative definition of "authority," these truths entail that authority is an illusion, and provide

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1. LAURENCE CLAUS, *LAW'S EVOLUTION AND HUMAN UNDERSTANDING* (2012).

2. See *id.* at 6 ("The claim of *authority* in the historic sense of a 'because I said so' right to be obeyed has been very widely treated as a defining ingredient of law and government. But it is not . . ."); *id.* at 45 ("[A] clear-eyed vision of [law and government] has no use for the historic idea of authority as a 'because I said so' right to be obeyed.").

some important premises for a plausible further conclusion or pair of conclusions: it is harmful, both in practice and in theory, to say that some person or body *has authority* (“the rule of men”); and harmful to offer to explain law (or the law, or “the rule of law”) as a result of authority; and perhaps harmful even to say that it is authoritative.

Stipulative definitions are free, and it is absurd to contest them. But we are entitled to demur<sup>3</sup> when a stipulated definition diverges—as the book’s definition of authority does, widely—from the patterns of use and meaning established amongst reflective speakers in a self-conscious culture, or from the concepts deployed in a rationally sound body of critical discourse such as ethics, political philosophy or (tucked in under these) the philosophy of law. So I will say a bit about this divergence, and then a bit about some of the other, related matters and engaging vistas that Laurence Claus opens up for us on his bracing, enjoyable and instructive exploratory hike through some of the High Sierras of human community. I shall touch on seven rather overlapping topics or clusters of topics: duties of compliance; predictions and expectations; responsibilities; purposes; decisions; presumptions; and evolution by intelligent design.

#### I. DUTIES OF COMPLIANCE

My duty, as a litigant party or professional legal representative, to comply with a judicial order made with facial authority by the court (whether by its clerk, master or judge) is one of the facts of life in California, England and many other places. And the general need for general acknowledgement of such a duty is obvious to everyone, even when it grates in a particular case. But it would be really odd to think that the clerk or master or judge has a right to be obeyed. The duty is to comply with the order, and *who* made it is usually immaterial. It would be odd even to say that the Court or the state or its judiciary has the right to be obeyed. But the duty—synonymously, the obligation—to comply with it is clear enough (appeals, collateral challenges and revolutionary breakdowns set aside). So, is this a duty with no correlative right? And is there nothing to say about the role of the clerk, master or judge in establishing the duty? Surely not. About the duty, and all such duties to comply with law, I said in *Natural Law and Natural Rights*:

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3. All the more so when it emerges that *Law’s Evolution and Human Understanding* intends its account of authority not as the stipulating of a definition and unfolding of its implications, but as a report and critique of “the old idea” of authority that (the book holds) is regrettably enduring, indeed still current, and “deserves to be dispelled wherever we encounter it.” *Id.* at 106.

All my analyses of authority and obligation can be summed up in the following theorem: *rulers have*, very strictly speaking, *no right to be obeyed* (see XI.7); but they have the authority to give directions and make laws that are morally obligatory and that they have the responsibility of enforcing.<sup>4</sup>

So, what Laurence Claus thinks fatal to the very idea of authority is, I would say, fundamental to the idea as deployed in our language and practice, and in a sound jurisprudential and therefore moral understanding of what it is to have a decent society.

Claus sees authority in his stipulated sense being asserted by the exasperated parent who tells her child to do what she says because she says it. So it is. But the parent is foolish (as Claus indicates).<sup>5</sup> That is never an appropriate thing to say, and saying it *regularly* will infantilize both child and parent and anyone who thinks this sort of directive appropriate. Even in exasperation, decent parents will tell the child that such-and-such is what *needs doing*,<sup>6</sup> and will respond to the child's endless "Why?" by saying "You'll understand [later]" or words to that effect. The source of the parents' authority to make a decision (a choice between alternative reasonable options, not to mention unreasonable ones), and to insist on compliance with the course of action thus adopted, is both their presumptively superior understanding of the dangers and opportunities latent or patent in the circumstances, and the standing need for *some*

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4. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 359 (2d ed. 2011) [hereinafter *NLNR*] (emphases added), reaffirmed in the 2011 Postscript to *NLNR* at 474 n.44 (quoted below at note 40). The internal reference is to an elaborate argument about "the role of legislative will or decision in creating *legal* or legal/moral obligation." *Id.* at 332–37 (emphasis added). So the passage just quoted from page 359, though (as required by the context) it was addressing the *moral* obligations that (presumptively) result from exercises of legislative and other forms of constitutional authority, nonetheless also implicitly affirms that such exercises of authority can and do create *legal* obligations without creating any legal or moral *right to be obeyed*. Though I can see some reason for holding, like Claus, that "[t]here isn't really any other kind" of obligation than moral obligation, CLAUS, *supra* note 1, at 103, I think it is clearer and more exact to hold that there are legal obligations distinct from moral obligations. See *NLNR, supra*, at 308–20; John Finnis, *Reflections and Responses*, in *REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS* 553–56 (John Keown & Robert P. George eds., 2013).

5. See CLAUS, *supra* note 1, at 5 ("Parents rightly tell young children that parents know better.").

6. This need not mean "needs doing by anyone anytime," but may mean "needs doing by us/you given that this is the course of action we parents have chosen to protect our family's interests or concerns," for example, "given that we've decided to drive to P to help the survivors of the fire."

decision to be made for<sup>7</sup> and complied with by the family group *as a set* of persons whose wellbeing (not infrequently, their avoidance of disaster) depends on their maintaining an appropriate degree of coordination, of unity (or not too much disunity) of conduct. The child, being scarcely able to understand either the circumstances, or the relevant dangers and benefits at stake, or the need for coordination, should be (needs to be) given, from the outset, the verbal clues that will help guide it, in due course, towards a more or less mature understanding of human wellbeing and of the place of exercises (and recognition) of authority<sup>8</sup> as one of the indispensable means to securing that wellbeing (and avoiding disaster).

Claus holds:

The old idea of authority works like a moral circuit-breaker. When the authority switch is tripped, we shut down our thinking about what to do, stay in the dark, and blindly do what we are told . . . . The idea of authority is binary—a right to be obeyed either exists and deserves to preempt our thinking, or it doesn't exist at all.<sup>9</sup>

But that has not been the mainstream idea of authority in our civilization. Speaking for a very old and mature idea of authority, the German Catholic bishops in 1874 publicly chided Chancellor Bismarck for his upstart, Prussian (Lutheran? Kantian?) idea of *unconditional* obedience.<sup>10</sup> Even

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7. It is this “made for” that indicates why Claus’s fallback (or at least secondary) position (or weak thesis) is mistaken in holding that [if not harmful and illusory] “‘authority’ [is] a mere synonym for law and government.” See CLAUS, *supra* note 1, at 64. We need a term or phrase (such as “have authority”) to predicate of those persons whose choice amongst available options will constitute an act of government and, perhaps, make, apply or enforce a law.

8. In Hohfeldian terms, authority to make a rule or order creating a legal obligation is a power, and its correlative is *not a right to be obeyed*, or even a duty to obey, but the subjects’ *liability*—roughly, susceptibility—to have their legal position thereby changed. See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 5 (Walter Wheeler Cook ed., 1923). How is it changed? By the creation of the obligation lawfully and validly specified by the exercise of power/authority. To whom is the obligation owed? If to anyone, to all other law-abiding citizens, and/or to the intended beneficiaries of the performance of the obligation/duty. Who, indeed, ever speaks of a right to be obeyed? I find no modern or other lawyer quoted to that effect in *Law’s Evolution and Human Understanding*.

9. CLAUS, *supra* note 1, at 63.

10. See JOHN FINNIS, *Conscience in the Letter to the Duke of Norfolk*, in *RELIGION AND PUBLIC REASONS: 5 COLLECTED ESSAYS OF JOHN FINNIS* 209, 209 n.1 (2011) (“Bismarck’s . . . circular-despatch of 18 May 1872, claiming that [the First] Vatican [Council] established a papal totalitarianism, had been first made public on 29 December 1874. The response of the German bishops . . . includes the sentence ‘es ist wahrlich nicht die katholische Kirche, in welcher der unsittliche und despotische Grundsatz, der Befehl des Obern entbinde unbedingte von der eigenen Verantwortlichkeit, Aufnahme gefunden hat’ (‘it is not the Catholic Church that has accepted the immoral and despotical principle that superior orders release one unconditionally from personal responsibility’).”).

in the military context, where ideas of command and obedience have their fullest vitality and rationale, mature staff colleges teach young officers both that there can be occasions for disobeying orders, in order to avoid disaster or snatch a great victory, *and* that if you misjudge the occasion and fail to avert the disaster or snatch the victory you are liable to be justly punished with exemplary severity. The good staff college will join Claus in celebrating the uplifting example of Marine Corporal Dakota Meyer's rescue of thirty-six men by disobeying the repeated order to maintain his position as the rearguard; but to the book's all too brief remark that had his disobedient actions made matters worse "he might have faced a court martial,"<sup>11</sup> the good teacher of leaders and troops will add that such a court martial would be (presumptively) required by justice and by the elementary norms of the craft of war and could—with presumptively both entire justice and military appropriateness—result in very severe and exemplary punishment.

The idea that rules of law have *preemptive* force was introduced into modern jurisprudence, so far as I know, by Joseph Raz, in substitution for his own earlier term "peremptory" (force, reason for action). "Peremptory" had meanwhile been taken up in some of Hart's very late writings, where Hart treated peremptory reasons as reasons cutting off, or intended, taken or entitled to cut off, all further deliberation (or at least all further "independent" deliberation) and practical reasoning by the person they address or apply to.<sup>12</sup> Binary-sounding terms such as "preemptive" and "peremptory" were no part of the classic, "old" account of authority, law and governance, which worked instead with the idea of presumptive (and therefore defeasible), albeit weighty/serious, reasons for action and obligatory force. As I shall say again in Part VI below (about presumptions): law's moral authority, that is, its moral obligatoriness, is presumptive in that it can be overridden, that is, set aside or in a sense nullified, both by its serious injustice and by serious moral competing reasons for action, that is, competing moral responsibilities that amount in the circumstances to

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11. See CLAUS, *supra* note 1, at 61.

12. See H.L.A. Hart, *Commands and Authoritative Legal Reasons*, in ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 243, 253, 261 (1982). For Raz on "peremptory" reasons as "categorical protected reasons," see JOSEPH RAZ, *The Obligation To Obey the Law*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 233, 233–37 (1979) (where "categorical" is given no explication but in context means "absolute or conclusive"; see the essay's first sentence). (A protected reason, in Razian usage, is a reason for action, protected by an exclusionary reason; but exclusionary reasons need not exclude all countervailing reasons, but only one or some.) See *id.*

obligations. The genuine “old idea of authority” is not binary at all.<sup>13</sup> Even military commands address persons who retain their moral and legal responsibility never to do wicked things even under orders (and who know that “I was ordered to” is not a sufficient defense to certain charges), and who retain also their responsibility to act with the view to the safety of their comrades, the survival of their unit, and the defense of their country. But those countervailing responsibilities both frame and are framed by the truth that prevailing in battle depends on lawful orders being treated as decisive in all but exceptional kinds of circumstances and that, in all but exceptional circumstances, the judgment whether the circumstances are of such an exceptional kind is to be reserved to those whose responsibility is to call the shots, to lead, to command. Civil litigation is quite another context of decision-making, but some analogous principles hold good concerning the exceptional character of the circumstances in which it could be right for an officer of the court to refuse or withhold compliance with the legally valid mandatory order of the court.

## II. PREDICTING, EXPECTING AND DELIBERATING

In the course of its strenuous reflections on Corporal Meyer, the book says: “Military discipline matters, and it is all about predictability.”<sup>14</sup> This is of a piece with the book’s enthusiasm for Holmes’s realism about law: that it is a body of “systematized prediction.”<sup>15</sup>

I do not think the book quite confronts, let alone refutes, the core argument among Hart’s arguments to show that thinking about law as a prediction will give you only a secondary, derivative understanding of what law is about, or what its characteristic *modus operandi* is, and thus its nature—and the answers to legal theory’s “persistent questions”: What are the relations between law and force (coercive orders), and between

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13. Raz was historically inaccurate, I believe, when he said:

[F]or most people an obligation to obey the law (and most people believe themselves to be under such an obligation) means something far more demanding than a *prima facie* reason. It means a peremptory reason best explained in keeping with my general analysis of obligation, as a *categorical* protected reason. The prevalence of this ‘strong’ notion of an obligation to obey, far from resting on naive and unreflective political attitudes, reflects a coherent and sober understanding of essential features of the political situation which has long been conveniently overlooked by most political theorists.

RAZ, *supra* note 12, at 235 (emphasis added). The first and last sentences are correct; the second is not. The last part of the last sentence looks back to the first sentence of the whole paragraph: “Liberal political theory usually assumes that an obligation to obey the law implies nothing more than a *prima facie* reason to obey.” *Id.* at 234.

14. See CLAUS, *supra* note 1, at 62.

15. See *id.* at 4 (citing Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897)); see also *id.* at 64, 100, 190 (discussing Holmes, *supra*, at 458).

law and morality, and what are legal rules? Hart is rightly keen to get to this demonstration, so keen that he first sets it forth, quite out of order, in the first chapter of *The Concept of Law*.<sup>16</sup> Claus cites it but does not quote it,<sup>17</sup> quoting instead two pieces of argumentation<sup>18</sup> that I consider secondary in Hart's demonstration.<sup>19</sup> Here is the passage that I think is doing all the work in Hart's thought about this issue:

[I]f we look closely at the activity of the judge or official who punishes deviations from legal rules (or those private persons who reprove or criticize deviations from non-legal rules), we see that rules are involved in this activity in a way which this predictive account [notably, Holmes's] leaves quite unexplained. For the judge, in punishing, takes the rule as his *guide* and the breach of the rule as his *reason* and *justification* for punishing the offender. He does not look upon the rule as a statement that he and others are likely to punish deviations, though a spectator might look upon the rule in just this way. The predictive aspect of the rule (though real enough) is irrelevant to his purposes, whereas its status as a guide and justification is essential.<sup>20</sup>

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16. H.L.A. HART, *THE CONCEPT OF LAW* 11 (3d ed. 2012).

17. See CLAUS, *supra* note 1, at 22–23 (citing HART, *supra* note 16, at 84 (2d ed. 1994)).

18. See *id.* (citing HART, *supra* note 16, at 84 (2d ed. 1994), and developing an energetic response to that passage). Claus recalls Hart's "arguing against predictive understandings of law," but he deals only with an argument of Hart against Austin's command theory insofar as that theory depends upon there being some chance that the coercive penalty will be applied—hardly the core (or even near the core) of predictive understandings of law such as Holmes's. See *id.* at 101–02 (citing HART, *supra* note 16, at 84 (2d ed. 1994)).

Incidentally, Claus expresses bewilderment that Hart could think that his critique of Austin in *The Concept of Law* could count against a predictive understanding of law, which after all will look not only to the behavior of officials and the occasions when there is no chance that they will impose a penalty, but also to the behavior of the offender's neighbors. *Id.* at 102. Claus seems to think, if I am not mistaken, that attention to reactions in this wider circle of people somehow converts the issue into a moral one. See *id.* Such a thought is misconceived: the draft dodger who can escape punishment but not the adverse criticism—whether communicated or not—of his neighbors may be a selfish drone condemned by his neighbors, a selfish drone applauded by equally selfish neighbors, a vile agent of the enemy, a heroic opponent of an unjust war, et cetera, et cetera. None of those truths or suppositions, all of them bearing on the moral issue, has anything to do with Hart's point, which is that the idea of *legal obligation* is not adequately accounted for by the predictability of a penalty being imposed. I agree, and would add that in considering the moral issues the reactions or indifference of the neighbors will play a quite subordinate role, far outweighed by the *grounds there truly are* for the neighbors' reactions or indifference.

19. HART, *supra* note 16, at 10–11.

20. *Id.*



If we soften “irrelevant to his purposes” to “normally irrelevant or a party-neutral postulate in his adjudication between the parties,” I think the passage as a whole is pretty exactly right, both as an account both of the *facts* about how judges, officials and law-abiding citizens *do reason*, and as an indication of a pattern of thought, a form and fragment of *practical reasoning* that is thoroughly justified (given various background assumptions, which Claus’s discussions equally take for granted, about the general justice of the legal system).

But if I am right about the general soundness of the Hart passage just quoted, Claus’s substitution of *prediction* for *guide* and *reason for action* is unsound because distracting us from both the real facts and the rational structure of legal and moral justification.<sup>21</sup> The book’s only argument for making the substitution is that the alternative, the only alternative, to prediction and predictive function is the myth-ridden and infantile idea “that lawgivers have . . . a ‘because I said so’ right to be obeyed.”<sup>22</sup> But this is presenting us with a false choice.<sup>23</sup> There is a *tertium quid*, a third way, and it is the one that Hart’s book articulates—and is fully consistent with the passage just quoted. Hart does not quite carry his line of thought all the way through to its proper conclusions—as he could and should have done by going all the way forward to rejoin the old mainstream of our civilization’s legal-moral thought.<sup>24</sup>

Attempts to reduce deliberation to prediction could not<sup>25</sup> be other than “changing the subject”; that is, talking about something other than what is at stake, and confusing *ought to be* with *is*; that is, with *will be* (that is, with the “*is*” proposition that will be true in the future). Of course, all

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21. The court’s normal task is to determine what, according to law, ought to be done, and it would be a kind of insanity for the judge to focus on what he will do, before he decides to do it; and in most cases it will be a dereliction of duty for the judge to give much, let alone primary, attention to what other persons may be expected to do in relation to his order, the parties, and so forth.

22. See CLAUS, *supra* note 1, at 24.

23. The same or analogous false (too binary) alternatives are latent in quite a few parts of the discussion. See, e.g., *id.* at 35 (“Mastery of knowledge implies mastery of people not at all.”); *id.* at 64 (“What makes words law . . . is . . . ‘systematized prediction,’ not rights to be obeyed.” (footnote omitted)); *id.* at 105 (“Law’s reality is not prescription, it is *description*.”); *id.* at 127 (either lawgivers have a right to be obeyed *or* what law signals is value of law’s effectiveness at helping us understand each other); *id.* at 189 (law is either prediction *or* an order to obey another human).

24. For another version of this claim of mine about Hart, and of the metaphor I have just used, see JOHN FINNIS, *Positivism and ‘Authority,’* in PHILOSOPHY OF LAW: 4 COLLECTED ESSAYS OF JOHN FINNIS 74 (2011); see also JOHN FINNIS, *Hart as a Political Philosopher*, in PHILOSOPHY OF LAW: 4 COLLECTED ESSAYS OF JOHN FINNIS, *supra*, at 257, 265.

25. I say “could not” because, as the next paragraph will say, Claus does not propose to collapse deliberation into prediction.

deliberation and reasoning about what to do has two kinds of premises: (1) *normative premises* (about goods and bads, benefits and harms, norms [precepts] and obligations, et cetera), and (2) *premises about facts* (about the circumstances, the likely patterns of causation and thus the likely or certain results of the alternative courses of conduct being deliberated on). Step-(2) premises are largely predictive, and may well include predictions relating to the likely or possible conduct or inactivity of relevant human persons, including other judges, officials and citizens or other players or bystanders. And deliberative reasoning ends normatively with goods and oughts. The place of predictions—vital as they are—is inherently subordinate, and all the more so when a prediction itself depends (either in its own evidence-base, or in the empirical causalities of the predicted behavior if it occurs, or both) on people treating a rule (in view of its authorized adoption and consequent validity) as among their direct step-(1) *reasons to act as it directs*.

Claus is in no doubt that, besides bare predictions of other persons' likely behavior and anticipations, there must be *reasons* based on opportunities to achieve human goods and avoid harms and losses. Still, instead of finding the reason where it normally is (picked out in the relevant legal rules), and instead of finding the good where it normally is (in the states of affairs that will come into being if the *rule is followed*), he has to go looking sideways, to a vaguer good: "Being able to predict what others in our community will likely do and expect . . ."<sup>26</sup> He does not, I think, confront the objection that *that* good will be little if at all damaged or prejudiced if I, the judge, covertly ignore the rule (as the complexity of litigation often makes possible) and throw the judgment to the party I secretly favor on irrelevant grounds; or if I, the party's legal representative, secretly destroy discoverable documents prejudicial to my client's case, for the sake of advancing my career. Fleeing the bugbear of a right to be obeyed, Claus's law-as-prediction theory ignores or sidelines to the point of disappearance the entitlement—the right—*of law-abiding citizens* that I the judge and you the professional legal representative *comply with the law* as a fair system of coordination of actions by directive rules, not disputable predictions of the conduct of indefinitely wide classes of persons.<sup>27</sup>

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26. See CLAUS, *supra* note 1, at 22.

27. Note that Claus's main account of what a purportedly directive rule's or order's true meaning is seems to be that the rule predicts the conduct of its subjects or

A side note. Hart focused, as I have just been doing, on the practical reasoning of the judge, and then on that of other officials, and to some extent on the practical reasoning of other subjects of the law. That focus was sufficient to demonstrate the error in Holmesian reductive realism. It was itself not only incomplete (as was always obvious not least to Hart) but also, I have come to think, to some extent reductive. For, like the whole of *The Concept of Law* and most modern jurisprudence, it neglected the older and sounder idea and theory, which focuses first on law's reality as the immediate goal (direct object) of *legislative* deliberation and decision. Lawmaking (whether by legislatures or by higher courts) is prior to law applying. Still, neither is fundamentally predictive, though each proceeds on the predictive assumption that some sorts of decision are unlikely to achieve the intended benefits because some, many or all people will not comply with them, or will reverse or nullify them; and each further proceeds with an awareness that if and to the extent that they do succeed in achieving more or less what they intend, that success was more or less predictable and provides grounds for further predictions of the likely or possible outcomes of other decisions (orders, rules, et cetera). Systematized prediction is an important part of the reality of law, and an important presupposition of and means to its utility and worth. But it is, to repeat, neither the first premise nor the decisive conclusion, but just a (necessary) step (one amongst others) and a byproduct.

"Military discipline matters, and is all about predictability."<sup>28</sup> This again, I believe, makes primary what is secondary—indeed, it declares the part to be not only the most important part but to be the whole. Military discipline is a means to survival and victory, and it works not, primarily, by enabling anyone or everyone to predict what everyone else will do (or is more likely than not to do)—predictions which are indeed, normally, a precondition of success—but primarily by directing soldiers (a) *what their duty is* and (b) that that is not the topic of a game of "spot the duty" but is what *is to be done by them* (whatever their inclinations and preferences). The concern of those who ordered Corporal Meyer to

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addressees; thus the draft notices of the United States purportedly *ordering* Laurence to *report* for military service are predictions that he will participate in imminent military operations or at least will become a member of the U.S. armed forces. See *id.* at 54. There are prominent passages that speak otherwise, for example: "There is only one kind of valuable guidance that *all* law provides, and that is news of what other people in law's community are likely to do and to expect." *Id.* at 46. But though *all* (directive) law must address some person about what he himself is to do, I think that statements such as the one just quoted are not meant to deny that the "news" which the book takes law to be concerned (as its primary function) to give includes news for the subject addressee about what *he* is going to do (!), or at least about what *he* "is predicted" to do.

28. *Id.* at 62.

stay guarding the rear was not, primarily, to predict or enable anyone else to predict what would happen to the rear or any other part of Meyer's unit's formation in battle. Their primary concern was to win the battle and enable the unit to survive its retreat. The threat they were concerned with was that in the absence of a rearguard, the whole unit could be simply rolled up and destroyed, if and when the enemy switched tactics (back to what had been predicted by the retreat's planners!) in mid-battle. The concern of those who gave the orders included—as part of those commanders' second-step factual/predictive reasoning—the knowledge that if Corporal Meyer thought he knew what the right thing to do was, as Claus's book declares “he knew,”<sup>29</sup> he (Meyer) was almost certainly mistaken about the quality of his belief as to what the Taliban would do or attempt. Military discipline presupposes the *unpredictability* of battle and requires men to hold the line when all seems lost. It is primarily about getting<sup>30</sup> men to *do* their duty, to *choose to hang in* in the fog of battle, and thereby to secure the end: the army's victory and/or survival. Of course, it also relies on those men reasoning that their comrades *will* probably be doing the same; but that anticipation, though very important for their reasoning,<sup>31</sup> is not what is primary, still less is it what discipline is all about. The predictability of the actions of everyone in the unit is a side-effect of their each treating orders as orders—that is, as directives to me that all my fellow soldiers (not just those whom I might rescue by disobedience) are entitled that I comply with—*obey*. My commanders are included in that *entitlement that I obey* on the same footing as my other fellow soldiers.

I have been using the words predict/prediction and anticipate/anticipation. The book regularly uses another word, “expect” and “expectation.” Scores of times we read that law functions as a signal of what people will “likely” do and “expect.” I am far from sure what this “expect” means, just as I was unsure, after reading hundreds of pages of *Political Liberalism*, what Rawls meant when he referred (as he did, scores and scores of times) to

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29. *Id.* at 61.

30. Or at least helping to secure that. In battle, military discipline will be only one motivating factor, and loyalty to friends (and predictive anticipation of reciprocal loyalty) will be another, partly independent factor. Self-interest cuts both ways, in varying ways in varying situations.

31. Its importance is twofold: if they are holding to their positions, their thought can be (i) we are all more likely to survive and my holding mine is not futile, and (ii) I am being treated fairly by them and am not a mere sucker or fall-guy among free riders. See *infra* last three paragraphs of Part V.

what “all reasonable people may be expected to endorse.”<sup>32</sup> I had tried, on the basis of context, to assign each of Rawls’s uses of this phrase to one or the other of two columns: one in which “expected” means predicted, the other in which “expected” means something like “ought to.” The columns finished up with about the same number of entries in each; but Rawls never once adverted to the interpretative problem, which goes to the heart and viability of his entire project of liberalism by consensus.<sup>33</sup>

Consider a real life use of the word. The flag signal sent by Admiral Nelson to his fleet before the decisive naval battle against Napoleon in 1805, “England expects that every man will do his duty,” exploits the ambiguity. The “will do”—not: “to do”—might seem to favor a purely predictive sense. But no one doubts that in the dominating context of “do his duty” (and in the wider factual matrix), the normative sense of “expect” was uppermost<sup>34</sup>: your people at home, your nation, will judge and does judge it to be *the duty* of each one of you, as a member of the nation, to *do your duty* as a member of the fleet and of your own ship’s company. Any implied predictions, such as that public opinion will hold cowards in scorn and applaud their punishment, is quite secondary to the primary assertion that there is national unity of judgment (shared by Nelson and decent sailors in the fleet) about the duty—legal, military/naval and moral—of each man to fight, in the manner required by naval discipline and the orders of the day and each instant command,<sup>35</sup> to defeat an enemy<sup>36</sup> threatening to invade the homeland. *Not* excluded from Nelson’s thought was a further, supplementary thought (actually made plain enough by

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32. JOHN FINNIS, ‘Public Reason’ and Moral Debate, in *REASON IN ACTION: 1 COLLECTED ESSAYS OF JOHN FINNIS* 256, 260–61 (2011); JOHN FINNIS, *Religion and Public Life in Pluralist Society*, in *RELIGION AND PUBLIC REASON: 5 COLLECTED ESSAYS OF JOHN FINNIS*, *supra* note 10, at 42, 52.

33. See ‘Public Reason’ and Moral Debate, *supra* note 32, at 261.

34. The signal required six if not twelve lifts of the flags, because the last word, “duty,” was spelled out letter-by-letter, unlike the preceding eight words. See *An A to Z of Nelson, E - England Expects . . . Vice-Admiral Horatio, Lord Nelson*, ROYAL MUSEUMS GREENWICH, <http://www.rmg.co.uk/explore/sea-and-ships/in-depth/nelson-a-z/england-expects> (last visited Oct. 15, 2014). The signal as drafted by Nelson used the word “confides” instead of “expect,” *id.*, and this manifests the normative gist of the whole proposition; for “confides” means “puts its trust in . . .” But “confides” was not a word in the signal book, whereas “expects” was; so Nelson accepted his signalman’s proposal to use “expects.” See *id.*

35. Other predictive senses are much more important to the resonance and power of Nelson’s signal: to say to someone “I am confident you will fight like a man” has the normative illocutionary force of (i) an encouragement by way of a reminder of, and appeal to, the example of iconic heroes, and (ii) an expression of belief that the addressee has it in him to emulate them; the encouragement conveys a norm or standard of effort and accomplishment, and holds it out as one that the addressee can indeed live up to.

36. The oldest ally of the United States of America.

him in advance)<sup>37</sup> *doing one's duty* as a member of the English fleet might involve disobeying a lawful order, in extreme and extraordinary circumstances. Such justified disobedience, chosen for the sake exclusively of the fleet's victory or survival, would nonetheless be at peril of justified censure and condign punishment if the disobedient conduct failed to achieve its effect, or obstructed the outcomes for the sake of which the order disobeyed was lawfully given. The order disobeyed remained in force, normatively alive not spent.

I return to the point about ambiguity. I am not at all sure what the book means by its stock phrase "likely [to] do and [to] expect."<sup>38</sup> To be consistent with its thesis that law is to be understood as "a purely predictive signaling system,"<sup>39</sup> "expect" should here be synonymous with "anticipate" or "predict": so law enables X (and all of us) to predict both what other people will probably do and what others will probably predict that X (and

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37. To the commanders of the English ships, who would be the only recipients of his own orders before and during the battle, Nelson gave a measure of executive discretion, by way of a kind of meta-order or instruction in non-imperative syntax: "[N]o captain can do wrong if he places his ship alongside that of an enemy." ROBERT SOUTHEY, *THE LIFE OF NELSON* 272 (1895). Every captain of course understood that the fleet's prospects of success depended heavily on *compliance* with the orders from Nelson that would articulate, on the day, his highly unorthodox plan of engaging the other fleet (superior to his numerically and in firepower) at right angles, a plan certain to involve some at least of his ships in the most painful exposure to unanswered enemy fire, and thus dependent for its successful execution on a very high measure of unyielding discipline from the captains thus exposed, with their crews, to extremely severe risks of complete destruction, a risk made higher than usual for the sake of the victory of the fleet as a whole and the defeat of the enemy's presumed invasion plans.

38. See, e.g., CLAUS, *supra* note 1, at 3. The problem extends to the related key word "signal" (as in: "law signals what members of the group likely do and expect"). "Signal that" is predictive; "signal to" and "signal for" are normative. See HART, *supra* note 16, at 90 (on "sign that" and "signal for"). Claus certainly seems to intend "signal" to mean something more than "sign that." How much more? Take, for example, the passage: "We will focus on the systems of signals that convey community customs . . ." See CLAUS, *supra* note 1, at 195 n.2. Now the ambiguity has slithered over into the word "convey." The Civil Rights Act 1965 conveyed a community custom largely if not, in many places, entirely by directing that very non-customary behavior become customary—or more frankly, *be adopted* (imperative/optative verbs)—forthwith on the law's coming into operation. The directive applies, and counts in the deliberations of the good citizen, even when no custom is in place among neighborhood citizens or officials any time soon, and even when this citizen judges that the likely long-term effects if not also many short- and medium-term effects of the new law are very bad for the common good, and that no true inherent moral rules track (or are tracked by) all the main directives of the Act.

39. See CLAUS, *supra* note 1, at 5.

the rest of us) will probably do. But I am not confident that the book is not trading on the other, normative sense of “expect,” in which “I expect you to turn up punctually” means “I judge that you ought to turn up punctually” or, if the speaker is in a position of authority (responsibility), “I direct you to turn up punctually and it will be wrong of you not to (without very strong countervailing responsibility-based reasons).” If readers are meant, or indeed permitted, to hear this normative sense, the plausibility of the whole argument is being enhanced by a factor at odds with its announced thrust: law as “purely” predictive.

### III. RESPONSIBILITIES

To have authority is to be in a position to bring it about that others are under a duty that, precisely as such, they would not be under but for that exercise of authority. This duty, as I have said, should not be conceived as having as its proper correlative a right to be obeyed. Rather, the duty, if owed to anyone, is owed to those persons for the sake of whom (and of whose wellbeing) the authority was conferred or is (and is to be) acknowledged.<sup>40</sup> This is why it is a severe degeneration of thought, and of communal life, for politicians to conceive themselves as, or be automatically assumed by journalists to be, seeking or wielding *power*.<sup>41</sup>

To confer authority on someone—or to accept and exercise it—for reasons other than *for the sake of the common good* is, presumptively, unjust and contemptible. (The common good in question may be that of a family or other restricted private grouping, as with the authority of the

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40. See *supra* note 3. The Postscript to *NLNR*, 474 n.44, remarks:

If one must locate a party to whom the obligation to obey the law is owed, it should be one's fellow-subjects rather than the rulers (legislators, judges, administrators, police, et al.). [See pp. 359–60 above.] Hart saw this. [See his ‘Are There Any Natural Rights?’, *Phil. Rev.* 64 (1955): 175–91 at 185—quoted in the endnote (‘On Law and Obligation’) to essay IV.5 at 155–6.] But certain writings denying the generic *prima facie* obligation to obey the law are shipwrecked by their authors' supposition that such an obligation would have to be (or is commonly supposed to be) *to officials*.

The cited passage from Hart's 1955 article reads: “The rules may provide that officials should have authority to enforce obedience . . . but the moral obligation to obey the rules in such circumstances is *due to* the co-operating members of the society, and they have the correlative moral right to obedience.” H.L.A. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 185 (1955).

41. Of course, “power” can be heard, especially among lawyers, as synonymous with authority. But when relatively uncontextualized, it tends to be heard as simply the capacity to make a change, with paradigms such as horsepower, electric power, or in human affairs the sheer domination exemplified by Herod the Great, Napoleon, or Stalin, or by such instances of “charismatic authority” (a type of authority Claus discusses frequently in *Law's Evolution and Human Understanding*) as that of Muhammad at Medina.

executor of a will; or it may be of a university—or department—or other corporation; or of a military unit; or of the sorts of political community we call states; or of bodies established to look to even wider aspects of the human race's wellbeing.) Of course, any exercise of authority will be futile unless those whose duties and powers it purports to change do in fact, by and large, act or dispose themselves to act accordingly. To express that last proposition in the terms Claus deploys in *Law's Evolution and Human Understanding*, authority is empty unless its exercise can be *predicted* to change behavior (and dispositions) in line with the propositional content of its exercise—that, of the rule enacted or court-order made, et cetera. But this does not entail that that propositional content is itself predictive, or would be more (or even *as*) beneficial if it were. Even to *translate* it into a prediction is to replace its *point and substance* with a mere (indispensable) precondition of (one means among others to), and/or mere (albeit inevitable) side effect of, its efficacy.

The point of law is to change things for the better in the community whose law it is. Its substance is the prescribing of patterns of conduct as *to be chosen* by those subject to the law. (That “to be” is the idiom not of prediction but of prescription—as with the doctor's prescription to the pharmacist.) Law is a modality of coordinating for the sake of common benefit. Beyond a minimal level of complexity (roughly two persons with a simple objective), the coordination indispensable for common benefit cannot be achieved without some exercise and acknowledgement of authority—both exercise and acknowledgement being in good faith *for that common benefit*. Legal authority, and thus law, is authority deployed according to rules for its deployment, with rules about the making and applying of the rules, and about the consequences of non-compliance with them. Predictable efficacy (at least, a relatively low level of non-compliance) is a precondition and in that sense a necessary *means*. But an even more inherently necessary means is this: the law and its rules being understood and accepted *as prescriptive* (even when the formulation of the rule is indicative in its grammar)<sup>42</sup> in a relatively strong sense, such

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42. Claus points to the observations in *NLNR*, *supra* note 4, at 282 to the effect that “it is quite possible to draft an entire legal system without using normative vocabulary at all,” observations compatible with, and presupposing, that at the level of the *propositions* explicitly or implicitly expressed by such (or other) vocabulary the entire legal system and most of its parts (principles, rules, et cetera) are normative through and through in their meaning, intent and, presumptively, in their effect. See CLAUS, *supra* note 1 at 104, 227–28 n.12.



that the prescription is taken by its addressee(s) as presumptively excluding some otherwise attractive option or options.

The laws against burglary and rape, like the laws against non-disclosure of relevant and unprivileged documents in discovery or non-payment of court-ordered alimony, do not predict behavior, they prescribe it. I think Claus gets things the wrong way round when—expressing the gist of his book’s theory of law—he says: “The person who does not comply with a lawful order *is a lawbreaker, because existing law predicted that* within specified scope, *his actions would conform with* the signals of someone else.”<sup>43</sup> The choice to give legal effect to the moral precepts against burglary and rape, like the choice to make parties and their legal representatives disclose documents unfavorable to their case, and the choice to make marriages dissoluble but quasi-permanent in their financial effects, is in each case a choice to prescribe what other persons *are to choose to do*—that is, are to be under a legal obligation to choose to do. Responsible choice by the law-maker (including the “end-of-sequence” issuer of lawful orders) is addressed to the responsible choice of the law’s or order’s subject(s), and retains all its legal force even when made with high predictive confidence that it will not be complied with.

The book’s whipping boy, the “old idea” of law and authority, is articulated by Aquinas in his formal definition of law: Law is a prescription conceived, adopted and promulgated with a view to a community’s common good, by the person or body of persons *responsible for* [upholding the common good of] that community.<sup>44</sup> In terms of Hart’s four main types of responsibility,<sup>45</sup> this “responsible for” signifies role-responsibility, where “role” signifies something like *office*, the etymology of which—*officium*: duty—discloses its normative significance as concerned with duties to care for and promote the wellbeing of (the members of) some community (in the central case of law, a “complete,” that is, political, community).

#### IV. PURPOSES

So the question is why Claus’s book seeks to present law as predictive (“systematized prediction”) rather than purposive.<sup>46</sup> Claus may well reject that formulation of the question, saying that law has a characterizing

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43. See CLAUS, *supra* note 1, at 120 (emphasis added).

44. See JOHN FINNIS, AQUINAS 255 n.1 (1998) (quoting Thomas Aquinas’s definition of law: *rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata*: AQUINAS, SUMMA THEOLOGIAE I-II q. 90 a. 4; I here italicize the words equivalent to “responsible for”).

45. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 211–30 (1968).

46. See CLAUS, *supra* note 1, at 6.

purpose: shaping of predictions.<sup>47</sup> So I reformulate: Why does the book present law's purpose or function as shaping its subjects' predictions about their own and others' actions, rather than as: to shape its subjects' purposive actions *so that* those actions promote rather than obstruct the law makers' *wellbeing-intending purposes*? I'm not sure, but I infer from scattered remarks that Claus thinks our "motivations and purposes" are, like indeed the effects of our actions, "hopelessly mixed."<sup>48</sup>

But I think he should not abandon hope. If lawmakers can have so refined and stable a purpose as to affect their laws' subjects' expectations, then lawmakers can have such purposes as reducing the incidence of burglary and rape, promoting the administration of civil justice, and furthering the interests of ex-wives. Indeed, they can and do have such purposes as permitting or forbidding people to roam on agricultural land or domestic gardens, requiring or forbidding segregation between ethnic groups within the nation or ethnic quotas in universities or businesses, deterrent taxing of the emission of carbon dioxide, exempting or refusing to exempt religious entities or persons from prohibitions of discrimination on grounds of sexual orientation in employment or the supply of services to the public . . . . Some of these purposes you or I may rightly judge unjust, either as such or because of their makers' errors about facts, causalities, and likely outcomes. But the venture of instituting and maintaining the rule of law in a political community presumes that the adoption of purposes by law-makers at any stage in the sequence of law making will be guided, at least subjectively, by a purpose of promoting common good. Since the alternatives to the rule of law are anarchy or tyranny, this venture, hazardous though it be, is—I suggest—well motivated, rationally purposeful, and by no means *hopelessly* mixed in its motives, purposes or effects.

## V. DECISIONS

Reasoning is practical when it heads towards decision. "Decision" ambiguously straddles *judgment* and *choice*. Since choice is always between incompatible options each has been *judged* by the deliberating person to hold promise of benefit(s), choices are not constrained by judgments, not even by robustly normative judgments such as "this is truly choiceworthy."

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47. *Id.* at 21 ("law's function of, as Luhmann put it, 'stabilizing expectations' in the group").

48. *Id.* at 18.

So it is better not to collapse “judgment and choice” into “decision,” and I do so only to join the trend with a view to subverting it.

The book’s statement that “[a]uthority is an illusion that deserves to be dispelled wherever we encounter it”<sup>49</sup> is meant to be read down to make allowance for a non-illusory form of authority regarded by Claus, surely rightly, as quite acceptable: “authority as expertise.”<sup>50</sup> As he puts it:

Authority as an argument for taking expert advice is about mastery of *knowledge*. Authority as an argument for obeying leaders is about mastery of *people*. Mastery of knowledge implies mastery of people not at all. For example, if my doctor tells me to stay home from work because I am contagious, my duty to stay home is owed not to my doctor, but to my coworkers.<sup>51</sup>

The passage goes on to reiterate its statement about duty in terms of “[r]ights to be obeyed,”<sup>52</sup> a red herring as I have argued in Part I above. There is indeed a strong distinction to be drawn between theoretical and practical authority. But this is not a matter of “two totally different dictionary meanings of the word.”<sup>53</sup> Both forms of authority involve my setting aside (or being willing to set aside) what I would otherwise have counted as a good reason—in the one case, for believing, in the other case, for acting.<sup>54</sup> There are situations, not very extraordinary, when it is reasonable to treat the possessor of expert knowledge—theoretical authority—as, on that very ground, one’s leader, the bearer of practical authority to decide what one shall do even when his judgments run counter to what one otherwise counts as a good and sufficient reason to

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49. *Id.* at 106. And so, when Claus states that “[t]he British Parliament had [even in, say, 1870] no more *authority* over Canadians than the Roman Emperor Justinian had over medieval European communities,” *id.* at 144, he could and perhaps should have added (to reiterate his intentions and meaning more precisely) that the British Parliament had no more (and no less) *authority* over Canadians than their own Parliament in Ottawa now has, or than Justinian had over Constantinople on the day he promulgated the *Corpus Iuris Civilis*: in each case, *none*. See *id.* at 46 (“[T]he people who are lawgivers do not [have authority].”).

50. *Id.* at 35.

51. *Id.*

52. *Id.*

53. *Id.*

54. See Hart, *supra* note 12, at 261 (“[I]t is clear that the notion of a content-independent peremptory reason for action or something closely analogous to it enter into the *general* notion of authority, that is not only authority over persons in matters of conduct, but also authority on scientific or other theoretical matters and so in one sense authority in matters of belief rather than conduct. . . . [T]hough the statement of an authority on some subject is not regarded as creating an obligation to believe, the reason for belief constituted by a scientific authority’s statement is in a sense peremptory since it is accepted as a reason for belief without independent investigation or assessment of the truth of what is stated.”).

Similarly, in different technical vocabulary, see *NLNR*, *supra* note 4, at 233–34.

act in a different way. To refuse to attribute practical authority to one's mountain guide on a hike with one's children in the Alps is (presumptively) folly and a breach of one's duty to one's family. More important, it is a mistake to think of practical authority—whether of the expert or not, or guided by expertise or not—in terms of mastery of people unless one has first made clear that, say, parental mastery of a household is what I have been arguing the authority of leaders properly is: an incident in and often necessary (highly desirable) means of cooperating to common and mutual advantage (including the advantage of common freedom from domination by others, by burglars or party commissars or the agents and agencies of greedy merchants of consumables). And above all, for present purposes, we must bring to light what is hidden in the book's account, both in the last-quoted passage and at large: the need for *decision*, for choice between eligible alternative courses of conduct.

The doctor's expert information about contagion does not settle the matter, and his or her addition of advice (or of a purported instruction) to stay home does not settle matter. The moral duty to coworkers that Claus prays in aid at this point<sup>55</sup> may or may not exist, and may or may not be a true, bottom-line duty. Your "coworkers" may be counsel on your side plus counsel for the other side plus the judge, and the jury, and court staff, and other litigants in the queue, and there may well be need (acknowledged or unacknowledged by you or your doctor) for a *decision* about whether *this* risk of *this* disease warrants an adjournment. Is it a common cold, or HIV, or typhoid, or something in between? What is fair to all concerned? *That* is not a matter of expertise. Like Corporal Meyer, we *very often* do *not* know what is going to happen, and decisions authoritative for the many members of a group must be made by persons in authority, whether that be the majority in a show of hands, or the trial judge, or those who signed the arbitration agreement with its procedural directives, or whoever. To call such authority "mastery of people"<sup>56</sup> is to muddy the waters with an implication of servility.<sup>57</sup>

Practical authority, whether or not it draws on theoretical authority or unmediated application of expertise to help with the second (the fact-articulating) premise of its practical syllogism, is about *leading* people,

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55. See CLAUS, *supra* note 1, at 35.

56. *Id.*

57. Or so I fear. "Mastery" does not inevitably have that connotation: "master and mistress in their own household."

as a *service* to them by enabling them to coordinate their actions so as to avoid harmful collisions and waste of opportunities. In countless situations, the bottom-line moral duty is simply not settled until an authoritative decision has been made, settling—presumptively—what is to be done with a view to all the competing interests at stake in a situation of uncertainty. Law is not the only authority or source of such authority. But it is, for good reason, a very important one. And especially so when it is a question of defending and promoting the interests of the poor and vulnerable, where custom and practice can only rarely make an even remotely adequate contribution to doing justice of a kind that trenches on the interests of the rich and powerful. In such matters the elites must police each other by authority of law, rigorously maintained by judges and officials who regard themselves as *directed* by laws (taxation, anti-trust, et cetera, et cetera)<sup>58</sup> addressed to them as obligation-imposing, and demanding compliance.

Law, I believe, is not “human community listening and talking to itself”;<sup>59</sup> it is leaders and makers and judges deliberating and choosing and offering plans of action for adoption by all the relevant members of the community, an adoption by them into their own practical reason, if not for the reasons (thoughts about goods and about likelihoods) that persuaded the makers then for the generic reason that the conclusions of that reasoning are now requirements of law, which therefore you cannot treat as optional without prejudicing the institution of law itself and thus the community as a whole, and without unfairness to those who have benefited you in the past by shouldering—for the sake of the common good of having such an institution—this burden of compliance with requirements they did not consider appropriate. That your own compliance will not be in the context of the non-compliance of most others is one of the factual step-(2) premises in your practical reasoning towards compliance.<sup>60</sup> Claus is right to be interested in this predictive premise. But, in respect of most of our law and legal experience,<sup>61</sup> it is not itself a

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58. There are vast fields of desirable kinds of law between the law against murder and the law against driving at speeds accepted in social customs in place long after the law’s enactment. Cf. *id.* at 85. In these intermediate fields, acceptance of the book’s proposal to ditch the *directive* meaning and force of law (and related old ideas such as fidelity to law) would, I believe, do large damage to the common good. And the fish would rot from the top.

59. *Id.* at 8.

60. See *supra* Part II.

61. I make this qualification with an eye to the most basic features of the constitutional order, and even more so to the circumstances (where they have occurred or may occur) of the emergence of constitutional order by revolutionary or other non-legal means—that is, without benefit of authority. I have said something about such circumstances in *NLNR*’s chapter on authority referring to

motivating ground. Rather, it is a close-in factual premise for the normative thought that your compliance will in such a case be rendered merely futile, quixotic, fall-guyish. And likewise the facts about authorization, validity and so on are facts at least as important as the prediction of general compliance, for their normative significance. For the most part,<sup>62</sup> the predictability (likelihood) of compliance functions in practical reasoning by removing what would otherwise be a blocking or negating factor; it is the type of cause that the medievals would call a *removens prohibens*.

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the state of affairs which (presumptively) justifies someone in claiming and others in acknowledging his authority to settle co-ordination problems for a whole community by creating authoritative rules or issuing authoritative orders and determinations. . . . [T]he required state of facts is this: that in the circumstances the say-so of this person or body or configuration of persons probably will be, by and large, complied with and acted upon, to the exclusion of any rival say-so and notwithstanding any differing preferences of individuals about what should be stipulated and done in the relevant fields of co-ordination problems.

This emergence of authority without benefit of prior authorization requires, of course, the definite solution of a vast preliminary or framework co-ordination problem: *Whose* say-so, if anyone's, are we all to act upon in solving our co-ordination problems? Necessarily the solution will require virtual unanimity; *here* there will be no solution unless the preferences of the individual members of the community are brought into line. Such unanimity of practical judgment is, obviously, not easy to come by.

*NLNR*, *supra* note 4, at 248–49; *see also infra* note 62.

62. Once again, one must distinguish between situations. The following pair of paragraphs in *NLNR*, which could be read as proleptically supporting *Law's Evolution and Human Understanding's* basic theses, has its direct applicability in the lawless situation described two pages later. *See id.* at 61. When law is up and running, the predictability of compliance becomes a background factor such as I am trying to describe in the text above:

Authority (and thus the *responsibility* of governing) in a community is to be exercised by those who can in fact effectively settle co-ordination problems for that community. This principle is not the last word on the requirements of practical reasonableness in locating authority; but it is the first and most fundamental.

The *fact* that the say-so of a particular person or body or configuration of persons will in fact be, by and large, complied with and acted upon, has normative consequences for practical reasonableness; it affects the responsibilities of both ruler and ruled, by creating certain exclusionary reasons for action. These normative consequences derive from a normative principle—that authority is a good (because required for the realization of the common good)—when that principle is taken in conjunction with the fact that a particular person, body, or configuration of persons can, for a given community at a given time, do what authority is to do (i.e. secure and advance the common good).

*NLNR*, *supra* note 4, at 246.

It would be immoral—a violation of the virtues of practical wisdom, justice and mercy—to give prediction of others' conduct (and anticipations) more than a subordinate role in deliberating about what laws to make, what laws mean and direct, what laws to enforce and what to do about laws directing one to do what one would rather not do. This is not to deny that *Law's Evolution and Human Understanding* is tackling a genuine problem: What is the source of the moral authority of someone's or somebody's say-so? How can an *ought* come from such an (or indeed any) *is*. Are appeals to authority as ultimately ludicrous as "it's turtles all the way down"?<sup>63</sup> The book points in the broad general direction of the true solution: the place of step-(2), factual premises in practical reasoning grounded on step-(1) premises about the human good(s), and the presence, among the relevant step-(2) premises, of a background premise of predictable compliance— (so to call it—) by others. But Claus overlooks, I am arguing, the more primary step-(2) premises.

Take just one of the various relevant schemas of practical reasoning, concerning not lawmaking, or law applying, but my compliance as a citizen-subject of the law. In this context the important step-(2) premises include: that my contribution to the rule-selected coordination is *called for* by the rule; that my non-compliance with the particular legal rule or order in question counts as a defection from the whole social scheme of coordination by law (unless I have some morally admissible, presumption-overriding, obligation-defeating ground for excepting myself from compliance); and that since such defections, such treating of oneself as free to pick and choose, are just as available on other occasions and to everyone besides me, they amount to my making a move (beyond the empirical incidents of the present action) towards wide-ranging unraveling of and damage to the common good.<sup>64</sup> That last step-(2) premise then connects, also, with further step-(1) premises: about the good of fairness in the accepting of burdens of compliance when my turn to do so comes round (as appointed by directive rules directing me), I being someone who has benefited, is being benefited, and predictably will be benefited by other people's shouldering of the *same* type of burden, viz. (as each of us can say in his or her own case) compliance with rules of *our*

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63. See CLAUS, *supra* note 1, at 215 n.12 (applying by analogy Stephen Hawking's recycling of the age-old atheist misunderstanding of divine, transcendent causality as understood in the Jewish and Christian philosophy or natural theology).

64. If law is essentially prediction, why is it that "failing to act in a way that [is stipulated by a rule of law and so] coordinates our behavior for good purposes can be criticized as not following the law"? *Id.* at 80 (emphasis added). Surely such criticism—the presumptive justice of which seems implied by the passage—does not presuppose agreement between critic and criticized that the purpose of *that* rule of law is good?

*community's law* when such compliance is against my interests and/or the rule was not what I would have approved.<sup>65</sup>

## VI. PRESUMPTIONS

In referring to obligations and duties, I have been making, sometimes explicitly, a qualification about *presumptiveness* or presumptions. While legal obligation in the intra-systemic (intra-legal) sense is all-or-nothing, black or white, of invariant strength, the moral obligation to comply with the law (legal obligation in the moral sense) is presumptive, defeasible, liable to be overridden by countervailing moral obligations. That is the “old idea” that has prevailed in the best theory and much of the practice of our civilization. It is not captured or even considered attentively in the writings of Joseph Raz, whose ideas of law’s “pre-emptive” force are the foil and, in a sense, the guide for *Law’s Evolution and Human Understanding’s* discussion of these issues. There is enough looseness, brevity, and I think inconsistency in Raz’s discussions<sup>66</sup> to leave it possible that his idea that law has pre-emptive force approaches the idea that law has, morally, presumptive (and thus defeasible) obligation-imposing force. Claus takes it that a Razian pre-emptive reason, or reason of pre-emptive force, excludes (pre-empts) “the background reasons”—that is, all of them, on all occasions.<sup>67</sup> What are background reasons? “They

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65. For some explanation of these very compressed indications, see *NLNR*, *supra* note 4, at 302, 314–20. See generally JOHN FINNIS, *Law’s Authority and Social Theory’s Predicament*, in *PHILOSOPHY OF LAW: 4 COLLECTED ESSAYS OF JOHN FINNIS*, *supra* note 24, at 46; JOHN FINNIS, *Law as Coordination*, in *PHILOSOPHY OF LAW: 4 COLLECTED ESSAYS OF JOHN FINNIS*, *supra* note 24, at 66.

66. Some aspects of these discussions are illuminating and helpful, others not so much. For debate between us on related matters, see JOHN FINNIS, *Law’s Authority and Social Theory’s Predicament*, *supra* note 65, at 46; JOHN FINNIS, *Law as Coordination*, *supra* note 65, at 66.

67. See JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* 142 (2009). But later on the same page, discussing promises and legal directives simultaneously, this becomes “some of the background reasons.” *Id.* In Raz’s online abstract (2003) of his *The Morality of Freedom* (1988), we read:

Legitimate authorities provide *pre-emptive* reasons for action, in that the reasons they provide are not to be added to all other relevant reasons when assessing what to do, but should exclude and replace *some of* those other reasons.

Abstract to JOSEPH RAZ, *THE MORALITY OF FREEDOM* (2003) (second emphasis added), available at <http://oxfordindex.oup.com/view/10.1093/0198248075.001.0001>. I think that is not just a stray formulation of Raz’s position, and it is non-binary. But his



are the reasons that the authority was meant to consider in issuing its directives, provided, of course, that it acts within its legitimate power.”<sup>68</sup> The concept is, to say the least, elusive. And the whole argument fails to bear the weight of its conclusion, for its premise is “[Authority] cannot succeed as an authority . . . if it does not pre-empt the background reasons,”<sup>69</sup> but “success” is not all or nothing, and sufficient success might be attained without exclusion of all countervailing reasons on all occasions. Raz seems tacitly to admit this, by concluding the argument in much weaker form: “Authorities cannot [perform their function of improving our conformity with those background reasons] without at least the possibility that their directives will sometimes lead us to act differently than we would have done without them.”<sup>70</sup>

The old idea of law’s presumptive moral obligatoriness is not as weak as that last proposition nor as strong as Raz’s official definition of “pre-emptive force.” It is rather (A) that the moral obligations created by and tracking legal obligations can be defeated only by countervailing *moral* responsibilities; and (B) that in considering how strong the competing responsibility or obligation needs to be to prevail compatibly with justice, one should take into account not only—or indeed, not so much—the reasons the law-maker did consider or ought to have considered in enacting or otherwise establishing the legal rule or order, but also—or, indeed, rather—the framework consideration that, in fairness to other subjects of the law, one’s grounds for judging oneself morally entitled in the circumstances not to comply should be grounds that could be published to those other fair-minded subjects of the law and accepted by them as a reasonable policy or criterion of justified exception making compatible with the common good.

## VII. EVOLUTION AND INTELLIGENT DESIGN

“Law *evolves* rather than being *created*.”<sup>71</sup> This thesis, which explains at least the first part of the book’s title, seems to me more false than true. I am the last person to undervalue custom or sharing of the practices and language and sympathies and understanding that are the scarcely

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argumentation in this field undoubtedly has a drive towards the binary, a drive that is inappropriate. See JOHN FINNIS, *PHILOSOPHY OF LAW: 4 COLLECTED ESSAYS OF JOHN FINNIS*, *supra* note 24, at 6 nn.12, 13.

68. RAZ, *supra* note 67, at 142.

69. *Id.* at 141.

70. *Id.* (emphasis added) (quoted in CLAUS, *supra* note 1, at 219).

71. CLAUS, *supra* note 1, at 17.

dispensable matrix for law and the rule of law.<sup>72</sup> But even in those periods and ethno-cultural circumstances in which law can and does evolve (rather than appear by the decrees of powerful ruling people, such as a conquering people, say those British who imposed their law on scores of peoples throughout the world), it evolves by creative decisions made “interstitially” by persons (say judges) of vision and determination, like the English judges who decided time and again to defy repeated Parliamentary prohibitions and abolitions of trusts (uses). This is not to say that we should glorify the history of the common law, which on many important matters, such as intention as a core of *mens rea*, took centuries too long to reach positions consonant with the moral philosophy of the surrounding more adequately educated and reflective culture of even London. Be that as it may, the evolution of our constitution (the United Kingdom’s, and thus the United States’ and Australia’s) was given decisive impetus by two or three boldly creative decisions of Chief Justice Coke, who had the personal determination to face down King and Council and bring with him a body of judges few if any of whom (I believe) would have been capable of envisaging, adopting, proclaiming, defending and persisting in the very same decisions that we know as the *Case of Proclamations*<sup>73</sup> and *Prohibitions del Roy*,<sup>74</sup> instituting the separation of legislative, executive and judicial powers (authority!): substantively new law, though presented (and in part conceived) by him as the realm’s old law and custom. Whether it was old or new, its assertion was an act of prescribing and defining.

In many times and places (everyone should carefully judge this for themselves), a nation’s rule of law has to be maintained by those in a position to do so, by prescriptions designed, made, and prescriptively applied in face of piracy outside and inside the realm, outlaws and the infiltrations of hostile, indifferent, or would-be dominant foreigners, and above all against those citizens whose projects of enriching themselves— or of instituting the rule of a Leader or a Politburo—are obstructed by the web of laws needed to maintain the independence of individuals and

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72. I agree with much of what Claus says about custom. So I do not agree that “[t]he concept of a nation state is an artifact of international law,” *id.* At 122, nor with the adjacent but hardly compatible statement that “[t]he choice to call some geographical communities . . . ‘nation states’ is a self-referential choice made by people in institutions in those communities,” *id.*, if “merely” or “primarily” is to be heard in those statements.

73. *Case of Proclamations*, (1611) 77 Eng. Rep. 1352 (K.B.).

74. *Prohibitions Del Roy*, (1607) 77 Eng. Rep. 1342 (K.B.).

families working out *their own* salvation compatibly with common good. Those in a position to shape and uphold the rule of law need to envisage and systematically support forms of life in preference to alternatives. They may need, for instance, to support forms of life that tend to encourage the ongoing succession of generations sufficiently numerous, educated, and supportive of *this* community and *its* law rather than surrender it to people, whether incomers or insiders, uninterested in maintaining this law or perhaps indeed any decent rule of law-rather-than-men.

At no time is it sufficient to *understand* one's neighbors (however widely that circle is envisaged), or reasonable to treat understanding them as a primary goal.<sup>75</sup> More important than understanding is agreement on how to proceed in face of extensive disagreement, and more important than agreement is that it be agreement to a decent, just, sustainable form of communal coexistence, in which individuals and families—in principle *all of them*—can and are helped to choose *for themselves* to flourish as more than consumers of “bread and circuses.” The common *good* is the point of law, and law (including the rule of law) is no mere extrinsic means to, but rather a component of, the common good.

The human common good is not attained by instinct, like the common good and systematic common life of ants and chimpanzees. It needs again and again to be envisaged in the mist and storm of competing visions and ideologies, and then chosen from amongst the competitors, and pushed through and defended against opponents and complacent backsliders, and reasserted and vindicated against, for example, the negligence of decadent pursuers and marketers of private comfort and a life of harmless fun.<sup>76</sup>

So, both as theory and as prescription for the practical life of law-makers such as we all in some sense (and to very varying degrees) are, I question the prioritizing in *Law's Evolution and Human Understanding*

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75. Cf. CLAUS, *supra* note 1, at 127 (“One moral reason for doing what law signals would be a belief that lawgivers have a moral right to be obeyed. But as we have seen, such a belief is difficult to defend. Another moral reason for doing what law signals is the value of preserving and promoting law’s effectiveness at helping us understand each other.”). An earlier passage (rightly) treats understanding each other as a means to coordination: “Law’s purpose is to help us understand each other better, so that we can live together in community.” *Id.* at 121. But this still presumes that the degree of consensus needed (for the coordination needed for common good) will somehow follow or be enhanced by this and other modes of understanding each other, understanding that may in fact make agreement with, and even respect for, each other *more* difficult, as multicultural and multiethnic states quite often discover—too late to avert catastrophe or lesser forms of misery and lawlessness.

76. Again, anarchy is not essentially “a condition of . . . absent understanding, of failed community.” *Id.* at 143. Rather, it is the rejection of community by people who may well understand the desires and beliefs of others but have contempt for them, and may well understand their fears and vulnerabilities and choose to exploit them, or choose just to brush those people aside to get at what they want.

of the analogies between human societies and the systems of subhuman animal or inanimate creatures. There are some analogies. But the disanalogies inherent in the human capacity to choose, and to choose immorally, are of (I think) much more significance to both understanding what law is and upholding a rule of law worth upholding. To the extent that human law is a matter of evolution, it is, in each legal system and each of its elements, evolution *by design*. The designs may be sufficiently or insufficiently intelligent, insufficiently or sufficiently reasonable—and even when they are sufficiently reasonable, they can nonetheless be vastly *different*, in immediate impact and longer-term results, from other available and reasonable lawmaking proposals not adopted. And when to some extent it is a matter of revolutionary change or imposition (forms of change that are not all that infrequent), there too we again have law by design. The designs will be as reasonable or unreasonable—or simply as *distinctive*—as the character of these laws' makers.

And the implementation of design always has side effects, results not intended by the designers. Often these side effects will not have been foreseen, at least in their scale and impact. But always their discovery and analysis can and very often should be the occasion for a new and rectifying design—which might, for example, reform our ways by repealing the previously enacted plan because it was *excessive* in some or all of the important ways that made Leninism a bad option.

